The Henry Bierce Company *and* Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No. 348 a/w International Brotherhood of Teamsters, AFL–CIO.[1] Cases 8–CA–21471 and 8–CA–21995

May 20, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On February 6, 1991, Administrative Law Judge John H. West issued the attached decision. The Respondent filed exceptions and a supporting brief[2] and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[3] and to adopt the recommended Order.

[1] The name of the Charging Party has been changed to reflect the new official name of the International Union.

[2] The Respondent has moved to strike attachments to the General Counsel's answering brief. The General Counsel has opposed the motion, arguing tht they are responsive to contentions raised for the first time in the Respondent's brief to the Board. In reaching our decision, we have not relied on the attachments.

[3] In agreeing that the Respondent violated Sec. 8(a)(5) and (1) by withdrawing recognition from the Union on the basis of an unlawful poll of unit employees regarding their desire for continued representation by the Union, we find it unnecessary to rely on the judge's discussion of *Texas Petrochemicals Corp*., 296 NLRB 1057 (1989), enf. denied 923 F.2d 398 (5th Cir. 1991). Instead, we note that the Respondent has argued that the instant case arises in the Sixth Circuit and that the poll was lawful under *Thomas Industries v. NLRB*, 687 F.2d 863, 868 (6th Cir. 1982), which held that an employer may poll employees regarding union sentiments based on ''substantial, objective evidence of a loss of union support, even if that evidence is insufficient in itself to justify withdrawal.'' We reject the Respondent's argument and agree with the judge that even under the standards outlined by the court in *Thomas* the poll here was unlawful. In addition, we note that even if the poll were found to be noncoercive and procedurally fair under *Thomas*, the Respondent has not demonstrated the existence of sufficient objective evidence of loss of employee support for the Union to justify the poll, as the reasoning in *Thomas* requires. Thus, the poll does not constitute reliable objective evidence of a loss of majority status on which to base a withdrawal of recognition. We note that, in finding a showing of a loss of union support sufficient to justify the poll, the *Thomas* court relied on a rapid decline in checkoff authorizations, negative remarks about the union by one-third of unit employees, and six officials' resignations from the union. None of these factors, and no other similar factors indicating a *change* in employee sentiments, supports the Respondent's contentions that it had substantial, objective evidence of a loss of support here. Indeed, the Respondent mustered only one negative employee comment as evidence that employee attitudes toward the Union had changed. We note further that the court found the *Thomas* poll procedurally fair and the captive-audience speech noncoercive in part because the union president there also addressed employees before they voted. By contrast, the Respondent appropriated the speech given in *Thomas* but failed to notify the Union in advance that it planned to poll the unit employees in time for a union representative to be present. Thus, we find that the polling in this case is not supported by sufficient evidence of a loss of majority support or does not carry the indicia of fairness and reliability on which the court in *Thomas* relied.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, The Henry Bierce Company, Akron, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Paul C. Lund, Esq., for the General Counsel.
John E. Holcomb, Esq. and *Keith Pryatel, Esq. (Millisor & Nobil)*, of Akron, Ohio, for the Respondent.
Robert B. Laybourne, Esq., of Akron, Ohio, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOHN H. WEST, Administrative Law Judge. A charge was filed in Case 8–CA–21471 on December 19, 1988, by Chauffeurs, Teamsters, Warehousemen and Helpers, Local Union 348 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Union), and the Union filed the charge in Case 8–CA–21995 on July 31, 1989.[1] A consolidated complaint was issued on September 29, 1989, alleging that The Henry Bierce Co. (Respondent) violated Section 8(a)(1) and (5) of the Act, collectively, by (a) informing an employee in March 1989 that it was ridding itself of the Union[2] and by dealing directly with an employee over benefits, including his retirement, and other terms and conditions of employment, and (b) since November 1988 Respondent has failed and refused to execute a written contract embodying an agreement reached with the Union on April 24, 1987, which contract the Union requested the Respondent

[1] When the formal papers were introduced herein, Respondent requested that a charge which was filed May 1989, which charge was subsequently withdrawn, be included in the formal papers. Counsel for the General Counsel refused indicating that the withdrawn charge should not be part of the formal documents since it is not part of the proceeding. I agreed. Respondent renews its request on brief, indicating that the charge and the acceptance of the withdrawal provide background evidence to Respondent's Sec. 10(b) of the National Labor Relations Act (the Act) defenses in this action. In my opinion, Respondent has not shown any reason for including the aforementioned charge and the acceptance of the aforementioned withdrawal in the formal papers received herein. Respondent did not attempt to introduce the documents in question as Respondent's exhibits.

[2] Since about 1974 the Union has been the designated exclusive collective-bargaining representative of the involved unit. Recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective by its terms for the period May 1, 1984, to April 30, 1987. G.C. Exh. 3. The unit consists of the following:

> All mixer drivers (agitator and nonagitator), building supply drivers (single axle and multiple axle), warehousemen, yardmen, batchman (manual control) and owner operators, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

to execute in September 1987.[3] In its answer to the amended consolidated complaint, The Henry Bierce Co., Respondent, denies violating the Act as alleged.[4]

A hearing was held on January 16 and 17, 1990, in Akron, Ohio. Briefs were filed by the General Counsel and the Respondent.

On the entire record in this proceeding, including my observation of the witnesses and their demeanor, and after considering the aforementioned briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, an Ohio corporation, with an office and place of business in Akron, Ohio, has been engaged in the sale and distribution of building supplies and general hardware to retail customers. The complaint alleges, Respondent admits, and I find that at all times material, it has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is now, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The Facts

Robert DeStefano, a business agent and vice president of the Union, negotiated the 1984–1987 collective-bargaining agreement with Respondent. Negotiations on that contract occurred in April 1984 and that David Bierce, the general manager of Respondent, signed that contract on June 4, 1985.

David Bierce testified that the 1984 collective-bargaining agreement was not bargained on a multiemployer basis because Bierce believed that the employers involved in the Materialmen's Association, all of which companies had more than 20 employees, were too willing to make concessions to the Union to avoid labor problems.

On February 23, 1987, the Union gave its official notice to terminate the labor agreement as of April 30, 1987 (G.C. Exh. 6).

Regarding negotiations for the new contract, DeStefano testified that they began on April 15, 1987;[5] that during the first meeting David Bierce, after receiving a proposal from the Union,[6] indicated that because of the competitiveness of the industry they were in Respondent wanted some kind of relief in the agreement; that Bierce also indicated that he did not want to be part of any multiemployer group and that he was negotiating the contract on behalf of The Henry Bierce Co. only; that the meeting lasted for 45 minutes; and that he began negotiations not knowing how many employees were in the involved unit.[7]

David Bierce testified that he had a notation in his ''Pocket Day-Timer'' (R. Exh. 2), of a meeting with DeStefano at 1:30 p.m. on April 15, 1987; and that his recollection is that this meeting did not take place and it was scheduled for a later date.

DeStefano testified that the next and last negotiating session was held on April 24, 1987;[8] that David Bierce indicated that Respondent did not want to give a big increase because of the competitive nature of their business and Respondent was looking for some cost savings; that giving a bonus instead of an hourly increase was discussed; that Bierce was concerned about the increase in the pension; that omitting severance in lieu of the Respondent paying whatever increase in the pension there would be was discussed and was agreeable to the Company; that they discussed casual help which could result in a cost savings for the Company and Bierce liked this very much; that they discussed the $400 bonus; that all other matters were to remain the same;[9] that he was sure that jury duty pay was discussed although his notes do not refer to it; that the Teamsters' health and welfare plan and the Central States pension plan increases every year; and that

> Dave [Bierce] said that if we could live with that he could live with that and he said that we had a contract, but Bob give me the privilege of going back and talking to my father. You know how he is, he don't like the union. The other representative years ago had them on strike and its been a sour taste in his mouth for years and he says, ''Bob, I know my Dad will be glad to hear what you said. I just want to run it by him,'' he says, and ''just give me that courtesy.'' And I said, ''Fine.''

David Bierce testified that his first meeting with DeStefano regarding the 1987 contract occurred Friday, April

[3] At the hearing herein the General Counsel moved to amend the complaint to include the following allegation: On or about November 1, 1988, Respondent at its facility unlawfully polled its employees, and thereafter on the basis of this unlawful polling unlawfully withdrew recognition of the Union in violation of Sec. 8(a)(1) and (5) of the Act. Respondent objected to the amendment arguing that it was barred by Sec. 10(b) of the Act.

[4] Respondent's answer also contains a number of affirmative defenses, including (a) the complaint and charge are barred by the applicable statute of limitations, (b) at all times material, the Charging Party did not, in fact, represent a majority of the employees in the involved unit, (c) the Charging Party is estopped from asserting the existence or formation of a collective-bargaining agreement, and (d) the Charging Party has waived its right to assert the existence or formation of a collective-bargaining agreement.

[5] DeStefano's pocket calendar indicates that he had a meeting with David Bierce on April 15, 1987 (G.C. Exh. 7).

[6] G.C. Exh. 8.

[7] Charlie Morgan, an employee of Respondent's, who is also a member of the Union, testified that DeStefano did not ask him about what he would like to see in the contract. Morgan, however, testified that he discussed benefits with steward Harry Bauch who later went to the union hall to discuss ''it.''

[8] G.C. Exh. 7.

[9] DeStefano's notes of this and the April 15, 1987 meeting were received as G.C. Exh. 9. On cross-examination, DeStefano testified that changes from the prior contract involved (a) the elimination of severance pay, (b) casual labor, and (c) there would not be an incremental increase in the wage rate but rather a lump sum bonus in each of the 3 years of the contract. Also on cross-examination, DeStefano testified that he told Bierce that if there was any other savings in any other building contract, that he would give it to Bierce also. Subsequently, DeStefano testified that he and Bierce discussed changing the winter hour guarantee. DeStefano explained that under the old contract the employer was obligated to pay 40 hours per week under the winter hours. But under the ''new'' contract the employer was only obligated to give a guarantee of 25 hours a week, which DeStefano indicated resulted in a cost savings ''with all other companies and we gave it to Bierce, too.''

Morgan testified that he was never asked to ratify the contract.

24, 1987, at the union hall. With respect to this meeting, David Bierce testified that DeStefano gave him a four-point proposal including an annual incremental wage increase of $1 per employee per hour for each of the 3 years of the contract, maintaining the health and welfare plan, maintaining the Central States Pension Plan for the employees covered, and continue to deduct severance contributions with the Company continuing to contribute $10; that he opposed the incremental wage increase; that he did not think that there was any point of contention regarding the health and welfare, the Central States plan and the deduction and severance contribution; that he told DeStefano that he would take the Union's wage proposal back to his father and discuss it with him; that DeStefano also mentioned that the employees of a competitor of Bierce, which employees were apparently represented by the Union, were looking for an extra week of vacation; that he thought the vacations were mentioned at this first meeting; that he was not sure that DeStefano proposed that Bierce give 1 additional week of vacation to Bierce's employees; that if DeStefano did not propose an additional vacation week the only outstanding issue was the wages; and that it was his understanding that anything that was not bargained on or agreed to would remain the same.

When subsequently called by Respondent, David Bierce testified with respect to the April 24, 1987 meeting that DeStefano said that (a) he knew that Bierce did not have everybody signed up in the Union and although he had not seen Bierce's payroll records, he knew Bierce was not paying scale, and (b) as long as he, DeStefano, did not have somebody from Bierce at his office breathing down his neck, Bierce could pretty well do what it could get away with; that during negotiations in April 1987 Bierce had three employees in the Union[10] and three who were not;[11] that he did not reach agreement with DeStefano as to a contract at the April 24 meeting; and that he never told DeStefano ''we've got a contract but I'll need to take it back to my dad.''

On rebuttal, DeStefano testified that he never told David Bierce that he, DeStefano, knew that Bierce had people working for them who were not in the Union.

Within ''a matter of days'' of the April 24, 1987 meeting David Bierce, according to the testimony of DeStefano, telephoned him and ''said that we had an agreement and everything was fine.'' DeStefano testified that he told Dave Bierce that he was negotiating around 14 contracts and it would be a while before he got the contracts typed for Bierce's signature.

According to David Bierce's testimony, the second and last meeting with DeStefano took place on April 27, 1987, at the union hall. Regarding this alleged meeting, David Bierce testified that after this meeting there was disagreement on quite a few points of the contract, namely wages and vacations; that he told DeStefano that Bierce could not agree to any additional vacation time; that DeStefano mentioned additional vacation time; that he took the position that vacation time should remain the same; that after discussing the Union's wage proposal with his father after the first meeting, he proposed to DeStefano at the second meeting that the Company pay a lump sum of $500 per employee rather than the incremental wage increase; that he proposed that the lump sum would be payable on May 1 but it would be contingent on the employee's full-time employment through December 31 of the prior year; that in the alternative, he proposed to DeStefano that if incremental wage increases were unavoidable, the Company could live with increases of 30 cents the first year, 25 cents the second year and 25 cents the third year; that while the allowance for jury duty was rather incidental, he did not recall there was ever agreement as to jury pay; that while both parties stated their positions regarding vacations, he did not believe that there was agreement on this aspect of the contract; that while his DAY-TIMER calendar indicated that he met with DeStefano on April 24, 1987, it does not indicate that he met with DeStefano on April 27, 1987; that he was relying on his recollection that he met with DeStefano on April 27, 1987; that the entries on the bottom of the April 27, 1987 page in the ''TO BE DONE'' section of his DAY-TIMER refer to counterproposals to DeStefano's original proposal; and that when he told DeStefano that a lump sum would be preferable, DeStefano said that he would take it under advisement and get back to him.

When subsequently called by Respondent, David Bierce testified regarding the alleged April 27, 1987 meeting the he did not reach agreement with DeStefano at this meeting; that, as noted above, he proposed two alternatives, namely, a $500 lump sum payment or incremental wage increases up to 30 cents per man the first year, 25 cents the second year, and 25 cents the third year of the contract; and that DeStefano said the he would take it under advisement.

On rebuttal, DeStefano testified that he did not propose an additional 1-week vacation; that David Bierce never proposed incremental wage increases of 30, 25, and 25 cents; and that if Bierce had made such a proposal, he, DeStefano, would have accepted it because it would have been greater that the aforementioned $400 lump sum.

Neither in May 1987 or in May 1988, according to the testimony of David Bierce, did the employees of Bierce receive a lump sum bonus. No grievances were filed regarding employees not being provided with this bonus.

Sometime in July 1988, according to the testimony of David Bierce, DeStefano telephoned indicating that he wanted to get together on the contract. Bierce testified that DeStefano said that he had the document prepared and he wanted Bierce to look at it, review it, and work toward a signature on it; and that at no time after April 24, 1987, up until the meeting he had with DeStefano in August 1988 did he ever telephone DeStefano and tell him that ''everything's fine, my dad just has to look it over or we've got a contract.''

In August 1988, according to the testimony of David Bierce, DeStefano telephoned him and said that he would drop off a copy of the current contract. Twenty minutes later DeStefano gave the contract to Bierce. While David Bierce had the authority to sign the collective-bargaining agreement, he explained to DeStefano that his father was not there and he wanted to discuss the contract with his father. David Bierce leafed through the contract and saw the $400 lump sum bonus that was effective May 1, 1987. Assertedly he did not go beyond the section on wages at this point. Bierce testified that he asked DeStefano if the bonus had to be applied

[10] Bausch, Reese McAninach, and Morgan.
[11] Mark Noel, John Walker, and Gerald Bond.

retroactively.[12] According to Bierce, DeStefano could not answer. David Bierce testified that he also asked DeStefano if he had made any progress in negotiations with Medina Supply, which is a competitor of Bierce. According to David Bierce's testimony, at this point DeStefano ''more or less stormed out of . . . [the] office.''[13] David Bierce then looked through the contract. According to his testimony, when he found some clauses which seemed to be departures from the previous contract he telephoned Bierce's attorney who advised him that he would handle the matter.

When subsequently called by Respondent, David Bierce testified that he never told DeStefano in August 1988 when he came to Bierce's facility that ''the contract looks good, looks fine. . . . [and] he just wanted to have. . . . [his] dad review it.'' Regarding the contract DeStefano brought to Bierce in August 1988, David Bierce testified that there had been no prior discussion of starting time, winter hours, holidays, key men, extending Bierce's pension obligation to Central States beyond the term of the contract and adding a provision that would obligate Bierce to an employer's association trust agreement; and that he never had an understanding that he was supposed to eliminate the severance plan.

On rebuttal, DeStefano testified that he did not recall any conversation regarding Medina Supply when he dropped off the contract at Bierce in August 1988; that when he gave the contract to David Bierce he, DeStefano, pointed to the $400 bonus and the casual rates; that David Bierce then said, ''Well Bob, do you have any objection if I give it to my dad? He's not in too good shape. He's in the hospital;'' and that he agreed since at that time he felt that David Bierce was credible.

According to DeStefano's testimony, when the contract was typed in September 1987 and he telephoned David Bierce and told him that the contract was ready to be signed, David Bierce said that he would come down the first chance he got. Between September 1987 and the summer of 1988 DeStefano telephoned David Bierce three or four times about signing the contract.[14] In September 1988, according to his testimony, DeStefano brought the contract[15] to Respondent's place of business. He gave it to David Bierce, who asked to be given the opportunity to go over it with his father who was in the hospital. According to DeStefano's testimony, David Bierce said, ''[t]here will be no problems of getting it signed.''

A couple of weeks after he dropped off the contract DeStefano telephoned David Bierce. Bierce told him that he was meeting with an attorney and that his attorney would telephone DeStefano.

At the end of September or in early October 1988 Respondent's employee Alfred Boulton had a conversation with Joseph Thompson, a yardman, in Respondent's yard. David Bierce was present. Thompson asked Bierce about uniforms saying, ''If we were union we'd be—we would get uniforms.'' Boulton then said, ''You go ahead and ruin a good thing between the—the relationship between the drivers and the company.''

In late September or in October 1988 DeStefano forwarded a copy of the contract to Respondent's attorney. And in October 1988 DeStefano and the Union's attorney met with Respondent's attorneys. At the meeting, DeStefano showed Respondent's attorneys his notes of the meetings and his copy of the contract. Bierce's attorney, Steve Nobil, told DeStefano that there was a poll of employees. DeStefano testified that he knew what kind of poll it was.

Subsequently DeStefano spoke with Respondent's attorney who stated that the Respondent's position was that there was no contract. The Union then filed an unfair labor practice charge.

Morgan, who as indicated above is an employee of Bierce, testified that Respondent's employees were asked by Lou

[12] David Bierce negotiated the prior contract with DeStefano, which contract was retroactive. Bierce conceded that it had been his and DeStefano's practice to make everything retroactive.

[13] David Bierce testified that his brother, who was in the room at the time, asked DeStefano why that was a preposterous question. Assertedly, DeStefano told him to mind his own business.

[14] DeStefano testified that in the industry involved herein it is not uncommon to have contracts signed well after they have been negotiated. To illustrate, the General Counsel introduced the relevant portions of a contract the Union entered into with John Eagon Company, which handles the same products as Respondent, and which was effective beginning May 1, 1987, and not signed until May 6, 1988. (G.C. Exh. 17(a).) The relevant portions of contracts involving four other similar situations were introduced. (G.C. Exhs. 17(b) through (e).)

[15] G.C. Exh. 10. On Cross-examination, DeStefano testified that he believed that it was around August. And then he testified that he thought that it was September or October. Regarding art. 1, sec. 2 of G.C. Exh. 10, DeStefano testified that the Union did not appoint a union steward and the members did not want a steward. With respect to art. 3 of G.C. Exh. 10 DeStefano testified that the change to $400 in each of 3 years was agreed to by the Company. DeStefano also testified that he and Bierce did not agree to change the starting time and such a change would be a typographical error. The starting time was changed from 6–8:30 a.m. to 6:30–10 a.m. DeStefano testified that this gave the Company more flexibility on starting times. Also, DeStefano testified that he and Bierce did not discuss changing the holiday section of the contract, the benefits to be afforded to keymen, vacation schedules, or any changes in the health and welfare program; that the obligation with Central States effective May 1, 1990, was not discussed with Bierce; that while Bierce did not want to be a part of the multiemployer association the contract language speaks to the multiemployer association; and that while he and Bierce agreed to eliminate the severance benefit plan, art. 9 of G.C. Exh. 10 has the heading ''RETIREMENT AND SEVERANCE BENEFIT PLAN.'' According to DeStefano, the only change in the holiday provision was to have one personal day in the ''new'' contract versus two personal days in the old contract. But since the employees' birthday was added to the ''new'' contract, the total number of personal holidays remains unchanged. DeStefano testified that he could not see what change there was in benefits to keymen; and that the Employers' Association was no longer in existence at the time of the ''new'' contract and, therefore, any reference thereto is meaningless. On recross-examination DeStefano testified that the contract he brought to Bierce in 1988, unlike the 1984 contract, obligated the Employer to pay keymen for certain holidays while they were on layoff; that the 1988 contract he brought to Bierce added an extra week's vacation to the schedule for those having 20 years of service; and that Bierce believed that there still was an Employer's Association.

Morgan testified that after Bauch, the union steward at Bierce, retired, no steward was assigned to Bierce. Morgan was the only one left in the Union after Bauch retired. Morgan was aware of the $400 lump sum bonuses but he did not file a grievance over not receiving them.

Bierce to participate in a secret-ballot vote;[16] that he and the other drivers were told that they should vote either for the Union or to get out of the Union; that they went into the paint room in the stockroom and voted and then dropped their votes in a cigar box; that he never heard anything more about the Union; and that he never complained that he did not want the Union or that he was dissatisfied with the Union.

Boulton, who began working for the Respondent as a yardman and truckdriver in March 1988, testified that he, along with five other drivers and yardmen voted at Bierce's facility on whether or not they wanted the Union. According to Boulton, Dave and Tom Bierce were present. Assertedly Dave Bierce did most of the talking, asking employees present to vote on whether they were interested in being union or nonunion. Initially Boulton did not recall the Bierces saying that they wanted to be nonunion or union. After looking at his affidavit to the National Labor Relations Board (the Board), Boulton recalled that ''[t]hey said they would like to run the business as non-union, but it was up to us to take the vote. . . . They couldn't force us to do either way.'' Also, Boulton testified that they said, ''[t]hey wanted to be able to run the company the way they wanted to'' and ''[t]hey wanted to be able to have a wage where they could be competitive in the market.'' When the employees asked what kind of guarantees there were they were told, according to Boulton, by the company representative that ''they were not . . . [free] to say anything that would . . . [influence] us to vote one way or the other.'' Boulton testified that it was a private vote with the employees writing down yes or no on a piece of paper and putting it in a box. Subsequently Boulton testified he did not recall if he checked a box or wrote on the piece of paper. He believed that Leonard Summers took the votes off to the side and counted them. According to Boulton, the employees stood around until they were told the outcome. Boulton never talked to the Bierces about the Union or complained about the Union. On cross-examination, Boulton testified that he became aware that one of the Respondent's drivers, Morgan, was in the Union; that at no time did he authorize a dues deduction for Local 348 to get into the Union; that the poll was in November 1988; that when Dave Bierce gave a speech to the employees before the poll he appeared to be reading from a document; that Respondent's Exhibit 5, attached hereto as Appendix A, appeared to be the speech David Bierce read before the vote; that David Bierce was reading the entire time; that he thought that David and Lou Bierce were not present when the employees voted; that Summers basically supervised the vote; that Summers does not act as a supervisor over the yardmen or the drivers; that he was never asked to join the Union; and that the first time he met DeStefano was in May 1989 when he gave an affidavit to the Board representative and DeStefano was present. On redirect, Boulton testified that before the employees voted David Bierce read the statement and Tom Bierce said something to the effect that he wanted to be able to run the Company without people watching what he was doing all of the time; and that Tom Bierce was not reading from a piece of paper when he made his statement.

[16] Morgan was not sure if the vote was taken in March or November 1988.

Robert Papoi was hired as a yardman by Respondent in 1987. He became a truckdriver later that year. Papoi testified that a vote was taken at the Company's facilities concerning whether or not the employees wanted a Union; that David Bierce called the meeting of employees; that David and Tom Bierce and Summers were present; that David Bierce read from a paper; that the ballot was not printed but rather was just a blank piece of paper;[17] that the employees were told to go into a paint storage room and put a yes or no on the paper; that he has never talked to any representative of the Company about the Union; that he has never complained to anyone in the Company about the Union; that five other drivers and yardmen were present;[18] that after he voted the ballots were put in a basket or something Summers had; and that Summers took the votes out of the basket and counted them indicating that there were four against and one for the Union. On cross-examination Papoi testified that when he was hired he was aware that there was a Union at the Respondent and that Morgan, Bauch, and McAninach were in the Union. But he, Papoi, did not ask to join the Union and he never signed a dues authorization checkoff during his employment at Bierce. Papoi never met DeStefano before the hearing herein. He was not apprised of the existence of a collective-bargaining agreement for May 1, 1987, and he was never asked to ratify or vote on that agreement.

Strouble, who was hired by Respondent in 1988, testified, regarding the vote, that David and Tom Bierce called the meeting; that David and Tom Bierce, Summers, and six employees were present; that the purpose of the meeting was to vote to see if the employees ''wanted to go union or nonunion''; that David Bierce read from a piece of paper; that Tom Bierce did not talk at this meeting; that after David Bierce read a statement the employees went to another room one-by-one and voted; that there was nothing typed on the piece of paper on which the employees were to put a yes or no; that Summers took the ballots and counted them;[19] that he was told that the ballots were counted by Summers at that time but he never saw this occur; that he never complained about the Union or about not being in the Union; and that he never discussed the Union in the presence of any of the Bierces. On Cross-examination, Strouble testified that he never authorized the Company to make deductions for the Union; that when he was hired by Respondent he became aware that there was a Union there; that he knew Morgan was in the Union; that he did not receive lump sum payments of $400 in either May 1987 or 1988; that Respondent's Exhibit 6 looks like the involved ballot;[20] and that he never met DeStefano before March 1989 when he met him regarding the instant proceeding.

Wisel was hired by Respondent in May 1988 as a yardman. Subsequently he began to drive a truck for Respondent. Regarding the vote on the Union, Wisel testified that David

[17] Papoi did not recall the ballot having any writing on it but he testified that it could have had writing on it.

[18] Boulton, Carl Strouble, Mark Wisel, Thompson, and John Walker. Morgan was not present.

[19] Strouble's affidavit to the Board indicates that the employees were not told the outcome of the vote when Summers counted them.

[20] R. Exh. 6 reads: ''*BALLOT* Do you wish to be represented by the Teamsters Chauffeurs and Helpers of America, Local No. 348?'' It also has two boxes with ''YES'' above one and ''NO'' above the other.

Bierce read from a piece of paper before the vote was taken; that the employees then went into the backroom of the side of the paint room and voted separately; that he did not think the ballot had anything on it; that he thought that the employees wrote yes or no on it; that he did not think they counted the vote; that he had never discused or complained to the Bierces about the Union or about the fact that he was not in the Union; and that he has never had a discussion with anyone in supervision about the Union. On cross-examination, Wisel testified that when he was hired he was aware that Morgan was in the Union; that he never signed an authorization to deduct dues for the Union from his paycheck; that Tom and David Bierce left the meeting when the voting took place; that Summers supervised the voting; that the employees voted in a separate room; that Respondent's Exhibit 6 was the ballot he was asked to complete when he voted; and that he first met DeStefano just a few days before he, Wisel, testified here.

David Bierce testified that he conducted the poll because he wanted to determine what the sentiments of his employees were regarding the Union; that in late August or early September 1988 he, Boulton, and Thompson were working in the yard and Thompson asked Bierce what the Company was going to do about getting uniforms; that he told Thompson that he did not know that the Company was going to do anything for certain about getting uniforms; that Thompson said that if the employees were in the Union they would have uniforms; that Boulton replied, ''If you want to screw up a good thing over something as stupid as uniforms, get the Union in here'';[21] that no one else complained to him about the Union; that there was very little discussion about the Union; that no one else indicated that they were dissatisfied with the Union; that the vote was conducted because there was one guy in the Union and Bierce had a bunch of new hires[22] and he felt it was time to discern what the people wanted; that seven employees voted, including Morgan who voted earlier on the same day because he was leaving on vacation; and that on November 9, 1988, after the election, Bierce's attorney, who had advised Bierce on how to conduct the vote, wrote to DeStefano advising him that Bierce was not going to recognize the Union anymore (G.C. Exh. 23.).[23]

When subsequently called by Respondent, David Bierce testified that the poll occurred near quitting time between 4 and 5 p.m. on a Friday; that the regular payday at Bierce has always been Wednesday; that Morgan, who was going fishing on Lake Erie, voted earlier that day; that he read a speech prepared by Bierce's attorney, R. Exh. 5, to the employees, including Morgan, before they voted; that he did not deviate from the prepared speech; that he and his brother left the area while the voting took place; and that the results of the poll were one vote to maintain union representation and six votes against.

On rebuttal, DeStefano testified that normally when companies hire new employees they notify the Union.

Summers, who is a salesman for Bierce, testified that in November 1988 David Bierce asked him to be in charge of a poll of the employees; that he does not exercise any kind of supervisory authority over the yardmen or drivers; that the employees were given a slip of paper (R. Exh. 6), and they were asked to fill out the ballot either for or against and fold the paper and place it in a box; that he removed the ballots from the box and he handed the ballots to David Bierce; that everybody was present when David Bierce opened the ballots; that David Bierce left the room when the employees were voting; and that he believed that David and Tom Bierce were called back into the room when all of the ballots were in the box.

Morgan, who was employed at Respondent since 1953, testified that he has been a member of the Union since 1956; that in March 1989 David Bierce, in his office, told Morgan that Respondent was going to get out of the Union and it wanted to set up a program for Morgan under which he would receive the same benefits and retirement that other employees of Respondent received; that Bierce said that Morgan would be able to work until he was 60 years old; that Bierce wanted him to drop out of the Union; that Lou Bierce, David Bierce's father, told him that Respondent was going to get out of the Union since Morgan was the only one in the Union and Respondent was not ''signing up anybody else in the union.''

David Bierce testified that he fired Noel in 1987 or 1988 for returning from lunch with alcohol on his breath; and that no grievance was filed over his termination. On cross-examination Bierce testified that he did not notify the Union that Noel had been discharged; and that he never advised Noel that he could talk to a union representative.

General Counsel's Exhibit 13, which is a record of the payments which Respondent made to the Teamsters 348 Health and Welfare Fund, shows that at the time of the hearing herein, Respondent was current with its payments. Also, at the time of the hearing herein, Respondent had continued

[21] Bierce testified that subsequently the employees as a group requested uniforms; and that ''when they came to us in unison like that, we saw the support for such a thing, and recognized it, and provided them uniforms.''

[22] Bierce, following its usual practice, did not notify the Union about the new hires, namely Strouble, Boulton, Thompson, and Papoi. Art. II, sec. 1 of the last collective-bargaining agreement between Respondent and the Union contains, as here pertinent, the following language: ''THE EMPLOYER SHALL NOTIFY THE UNION IN WRITING OR BY TELEPHONE AS TO THE EMPLOYEE'S DATE OF ORIGINAL EMPLOYMENT.'' G.C. Exh. 3. None of these employees were brought within the Central States Pension program. Rather, they were brought under Bierce's profit-sharing plan, R. Exh. 4, and placed in Respondent's own group health insurance plan, R. Exh. 3. Previously, drivers Walker, Bond, and Noel were placed in Bierce's own group health insurance plan. Bierce did not notify the Union of this. None of these employees filed a grievance over being included in the Company's own plan. And none authorized dues deductions for Local 348. Employees hired from May 1988 up to the time of the hearing herein, Tom Rhoden and Mark Wisel, were also placed in Bierce's profit-sharing plan and its own group health insurance plan and neither filed any grievances over this.

[23] The letter, as pertinent, reads as follows:

> As I indicated to you on the telephone earlier this week, the Company has objective evidence that Local No. 348 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America no longer represent a majority of the employees of the Company; that there is no current collective bargaining agreement in effect; and that the Company no longer recognizes you as the bargaining representative for its employees.

DeStefano testified that he never received this letter.

to pay the pension for one of its employees, Morgan. (G.C. Exh. 14.) And Respondent made payments to the Union's Charitable Educational Recreational (C.E.R.) Fund through 1989. (G.C. Exh. 15.)

David Bierce testified that at the time of the hearing herein Respondent continued to pay the health and welfare, the C.E.R. and the Central States pension on Morgan and it continued to deduct dues for Morgan notwithstanding the fact that it no longer recognized the Union and it no longer had a collective-bargaining agreement with the Union because it did not want to do anything to jeopardize the benefits Morgan had coming to him from the Union; and that this was done against the advice of Bierce's attorney.

When subsequently called by Respondent, David Bierce testified that Respondent continued making the deduction and matching contribution for severance pay. He reiterated his earlier testimony that a union representative during a strike at Bierce in the early 1980's threatened to terminate the benefits of Bierce's employees if Bierce did not sign the involved contract. Also, David Bierce testified that the Respondent has never been audited regarding the Union's pension, health and welfare, checkoff or C.E.R. fund; that Bierce has never received a request from the Union for an employee seniority list; and that Bierce has never been subjected to legal proceedings regarding moneys that may have been due or owed by Bierce to these plans.

DeStefano testified that he did not recall any grievance or arbitration that he was involved in at The Henry Bierce Co.; and that within a few days of the hearing herein he became aware that the Company was providing its own health benefit program to drivers and yardmen.

Analysis

As noted above, the September 29, 1989 consolidated complaint alleges, as here pertinent, that Respondent unlawfully failed and refused to execute a written contract embodying an agreement reached with the Union on April 24, 1987, which contract the Union requested the Respondent to execute in September 1987 and since November 1988 Respondent has failed and refused to execute. As set forth above, some of the language in the collective-bargaining agreement which the Union gave the Respondent to sign was not agreed to by Bierce. Indeed, some of the provisions in the contract which General Counsel contends Bierce should have signed were never even discused in the negotiations. General Counsel takes the position on brief that all material aspects of the contract, including wages, were agreed to by Bierce and that those provisions in the collective-bargaining agreement which were never agreed to either benefit Respondent, do not change the situation, or have no effect on it. More specifically, General Counsel indicates that while the provisions eliminating the exception to paying key men holiday pay for Christmas or New Year's Day if they were on layoff was erroneously included, it is General Counsel's position that none of Respondent's employees, except Morgan, would qualify for this provision under the contract during its term. Assertedly, since Bierce does not lay off employees, the involved clause would have no effect on Respondent's operations. General Counsel contends that by Respondent's own admission there was a meeting of the minds except for the wages to be paid; that while the contract given to Respondent to sign may have contained a few altered clauses or provisions which in reality were of little or no significance, this can be easily remedied; that at no time since Respondent was asked by the Union to sign the contract did it ever object, or inform the Union, or the Regional Office that it objected to the inclusion of these clauses in the proposed collective-bargaining agreement; that the only action that Respondent engaged in was to conduct an unlawful poll and to use this as the basis to withdraw recognition from the Union; that in 1984 all of Respondent's employees were in the Union; that at the time Respondent was presented with a contract to sign its work force had changed substantially in that it had only one employee to whom it was paying contractual benefits and wages; that all other employees had been hired since April 1987 which fact was concealed from the Union, at rates and benefit levels substantially below the contract; and that it was because of this fact that Respondent determined to refuse to sign the contract, conduct an illegal poll and to unlawfully withdraw recognition from the Union.

Respondent, on brief, contends that General Counsel has failed to sustain his burden of establishing a full and complete meeting of the minds which is an indispensable predicate to any Board order compelling execution of an agreement; that admittedly a number of material items altered from the 1984–1987 collective-bargaining agreement were not discussed let alone agreed upon;[24] that not all of the material changes served to benefit the Company; that the contract was unilaterally altered by the Union so that Respondent became contractually obligated for a full day's pay for Christmas and New Year's Day when in layoff mode; that another unilateral alteration accorded an extra week of vacation to those employees hired after April 30, 1983, having 20 years of service; that the Union unilaterally established another benefit whereby employees were deemed to have accrued a complete year of service for vacation purposes upon working merely 1250 hours in a year; that the Union drafted 1987–1990 proposed contract bound the Company to continue its Central States pension contributions, including any incremental increases under the National Motor Freight Agreement, effective May 1, 1990, notwithstanding the remainder of the contract expired by its terms on April 30, 1990; that the Union unilaterally added a provision which not only authorized Central States to enter into various trust agreements to administer its fund, but waived the Company's right to contest any such agreements that had already been reached; and that the Union tied the Company to the multiemployer association it had so clearly objected to on several occasions.

Not even taking into consideration the conflicting evidence regarding wages and severance pay, the differences between the Union's draft contract and what was discussed and understood during negotiations demonstrates that there could not have been a meeting of minds between the parties. It matters not that Respondent did not immediately point out the differences. What I am faced with is the assertion that Respondent should be required to execute the Union's draft contract. I cannot resolve the differences for the parties. And even if I could, that is not my function. The above-described differences do not constitute minor deviations from any under-

[24] The items include starting time, holiday benefits, guarantee of winter hours, the ''key men'' provision, vacation time after working only 1250 hours a year, and three changes in the retirement section.

standing reached by the parties. A collective-bargaining agreement arises only after a meeting of the minds on all material terms of the contract. Clearly there was no meeting of the minds on the above-described material provisions in the Union's draft contract. The Board does not have the power to compel a company to agree to any substantive contractual provision of a collective-bargaining agreement. *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970). And it cannot ''sit in judgement upon substantive terms of collective bargaining agreements.'' *NLRB v. American National Insurance Co*., 343 U.S. 395, 404 (1952). Consequently, I find that Respondent did not violate the Act when it refused to execute the purported agreement.

As noted above, the General Counsel, at the hearing, moved to amend the complaint to include an allegation that on or about November 1, 1988, Respondent, at its facility unlawfully polled its employees and thereafter on the basis of this unlawful polling withdrew recognition of the Union in violation of Section 8(a)(1) and (5) of the Act. More specifically, the General Counsel made the motion on the second and last day of the hearing just before resting his case. Respondent objected. The motion was taken under advisement.

The General Counsel, on brief, contends that the motion should be granted since the unlawful polling and subsequent withdrawal of recognition were the direct result of and arose from the same factual circumstances and sequence of events, namely the Union presenting the Respondent with the collective-bargaining agreement to sign; that Respondent has raised the same or similar defenses to both the failure to execute the contract and the proposed amendments; and that the proposed amendments were fully litigated.

Respondent argues, on brief, that the Board has been particularly reluctant to allow a hearing amendment where, as here, the General Counsel and Charging Party were both aware of the violation well in advance of the hearing and for whatever reason chose not to pursue a timely amendment, *Dayton Auto Electric*, 278 NLRB 551 (1986); that in *New York Post Corp*., 283 NLRB 430 (1987), the Board found it would be unjust within the meaning of Section 102.17 of the Board's Rules and Regulations to allow an amendment at the last minute where the General Counsel was aware of the alleged unfair practices well in advance of the hearing; that in *Seward International, Inc*., 270 NLRB 1034 (1984), the Board noted that in considering the just nature of the amendments at trial it looks at whether the General Counsel has given the opposing party any formal pretrial notice concerning the pendency of potential amendments, which notice may vitiate the due process concerns raised by unexpected trail amendments; that in *Nickles Bakery of Indiana*, 296 NLRB 927 (1989), the Board indicated that (a) it would require a ''significant factual affiliation'' between a proposed amendment to a complaint at hearing of an allegation not previously articulated by way of a prior charge or complaint, and (b) it would focus on whether (1) the otherwise untimely allegations involve the same legal theory as the allegations in the pending timely charge, (2) the otherwise untimely allegations arise from the same factual circumstances or sequence of events as the pending timely charge, and (3) a respondent would raise similar defenses to both allegations; that here the belated inclusion of Respondent's poll would involve a challenge predicated on Section 8(a)(1) of the Act which assertedly has not been alleged in either of the charges involved herein; that the polling, the circumstances in which it was undertaken, and the predicate justification for understanding it are wholly unrelated to allegations that Respondent refused to execute a ''agreed-upon'' bargaining agreement; that the Respondent's defenses, viz, a lack of a meeting of the minds, are entirely distinct from any defenses it could possibly assert as to the poll; that the proposed amendment is not sufficiently related to the unlawful conduct alleged in the complaint; that the Board has refused to allow an amendment on the basis that it conformed to the proof presented as evidence, where, as here, an otherwise timely objection has been made at the hearing, *New York Post Corp*., supra; that Respondent's counsel was completely surprised, ''indeed ambushed at the hearing when it became apparent the General Counsel was attacking the poll through . . . [the employees called as] witnesses'' herein when Respondent's counsel assertedly believed they were called to testify about the alleged direct dealing with employees since the charge in Case 8–CA–21995 (G.C. Exh. 1(h)), alleged that Respondent had directly dealt ''with its employees'' and since these employees were only subpoenaed after the complaint was amended to allege direct dealing; and that it is axiomatic that if the poll of the unit cannot legitimately be challenged, neither can Respondent's withdrawal of recognition.

As set forth above, Respondent cites *Seward International, Inc*., supra. There a majority of the Board, namely Chairman Dotson and Board Member Hunter, speculated, according to dissenting Board Member Zimmerman, about how Respondent may have been prejudiced by the General Counsel being allowed to amend the complaint after most of Respondent's witnesses had testified. Here, both at the hearing and on brief Respondent does not assert or show how it would be prejudiced if the General Counsel is allowed to amend the complaint. As noted above, the General Counsel moved for the amendment before Respondent put its case in. Respondent did not request a continuance. It is noted that the poll was first brought up at the trial by Respondent during cross-examination of the General Counsel's first witness, DeStefano. Respondent's attorney asked DeStefano if he knew about the poll and if the Union had filed an unfair labor practice charge regarding the legality of the poll. When the General Counsel questioned his second witness, employee Morgan, about the specifics of the poll, Respondent's counsel did not object.[25] Indeed, one of Respondent's counsel asked Morgan on cross-examination about the poll, trying to get Morgan to indicate whether it took place before Morgan was asked to switch out of the Teamsters' plan. Only when the General Counsel started to question his third witness, employee Boulton, on the second and last day of the hearing herein about the poll did counsel for Respondent object, arguing that there was no allegation in the complaint or charge filed about the propriety of the poll, neither on substantive or procedural grounds, and even if the General Counsel tried to amend the complaint it would be barred by the statute of limitations. In response, the General Counsel indicated that Respondent, in its answer to the consolidated complaint, denied majority status and that the poll is material since it

[25] In my opinion, it is of no significance herein that Morgan did not vote at the same time as six of the other employees.

shows what was happening and what was occurring at that time. The objection was overruled.

In General Counsel's Exhibit 23, a letter Respondent's attorney assertedly forwarded to DeStefano, which letter is dated November 9, 1988, it is indicated that Bierce had objective evidence that the Union no longer represented a majority of the employees of the Company; that there is no current collective-bargaining agreement in effect; and that Bierce no longer recognized the Union as the bargaining representative for its employees.

As noted above, the charge was filed in Case 8–CA–21471 (G.C. Exh. 1(a)), on December 19, 1988. On January 19, 1989, Respondent submitted the above-described 11-page position statement to the Board. See Appendix B hereto.[26] Respondent's legal argument and conclusions are found on pages 5 through 11 therein. It is noted that on pages 9 through 11 Respondent treats the involved poll arguing that it had substantial objective evidence of the loss of union majority support; that Respondent polled in a noncoercive and procedurally fair atmosphere pursuant to the guidelines set forth in *Struksnes Construction Co*., 165 NLRB 1062 (1967); and that the Board has held that even assuming the parties have reached an agreement, if unsigned, it will not serve to defeat employee dissatisfaction of union representation which follows formation of the contract, but prior to its execution. *Crothall Hospital Services*, 270 NLRB 1420 (1984). It is also noted that in its February 16, 1989 answer to the original complaint (G.C. Exh. 1(c)), Respondent made the following affirmative defense: ''[a]t all times material herein, Charging Party did not, in fact, represent a majority of employees in an appropriate unit for collective bargaining.'' Its answer of October 13, 1989, to the amended consolidated complaint (G.C. Exh. 1(l)), herein contains the same affirmative defense. Also, it is noted that while Respondent claims surprise based on the fact that the charge in Case 8–CA–21995 (G.C. Exh. 1(h)), speaks to direct dealing and bargaining with its ''employees,'' paragraph 7 of the amended consolidated complaint, dated September 29, 1989 (G.C. Exh. 1(j)), specifies ''informed *an* employ*ee* that it was ridding itself of the Union and dealt directly with said *employee* over benefits, including *his* retirement, and other terms and conditions of employment.'' (Emphasis added.) Respondent was not surprised. In cross-examining DeStefano, Respondent's counsel demonstrated that his only surprise regarding this aspect of the proceeding was that there was no charge filed over this matter. Respondent has not shown how it may have been prejudiced. And I do not believe that there is any way it would be actually prejudiced by the amendment of the complaint to include the allegations regarding the poll and the withdrawal of recognition of the Union. Also, the poll is very much related to Respondent's refusal to execute. Respondent itself demonstrates that the poll is significantly related in its above-described November 9, 1988 letter, its above-described position statement, and its two above-described answers. The other cases cited by Respondent can be distinguished.[27]

It is also noted that in its brief, at page 51, Respondent states, ''[w]here an employer legally refuses to execute a purported agreement, and lawfully polls its workforce and withdraws recognition, an allegation of direct dealing cannot lie.'' Respondent, through its representatives, indicates that not only is the poll significantly related to its refusal to execute but it also is significantly related to the amended complaint allegation of direct dealing.

In conclusion, with respect to this aspect of the proceeding, the poll and the withdrawal of recognition are significantly related to the involved charges, the matter was fully litigated, Respondent's objection to the receiving of evidence on this matter, in my opinion, was not timely, Respondent itself has made the poll and the withdrawal of recognition an issue in this case, there was no showing of surprise which may have hampered Respondent's presentation of its defense on this aspect of the case, Respondent has not demonstrated that it would be prejudiced, and, in my opinion, Respondent would not actually be prejudiced by the granting of the General Counsel's motion to amend. Accordingly, the General Counsel's motion to amend the amended consolidated complaint is hereby granted.

Did Respondent violate the Act by conducting the poll, in the way it conducted the poll and by subsequently withdrawing recognition from the Union?

The General Counsel, on brief, argues that Respondent had no objective considerations in justification of the poll it conducted among its employees; that not one unit employee ever indicated to the Respondent before the poll that he did not wish to have the Union represent him for purposes of collective bargaining; that the Board applies the ''reasonable doubt'' test to determine whether an employer can legitimately poll its employees about their continued support for an incumbent union and this is the same standard the Board applies in determining whether an employer may legitimately withdraw recognition from a Union; that a Respondent violates Section 8(a)(1) and (5) of the Act when it fails to provide a union with advance notice of the time and place of a poll, *Texas Petrochemicals Corp*., 296 NLRB 1057 (1989);

[26] On brief, Respondent contends that there are certain inconsistencies between its position statement and the testimony of David Bierce herein because when the position statement was drafted David Bierce could not locate his ''DAYTIMER'' and, therefore, Respondent's counsel relied on information provided to them by DeStefano. Subsequently Bierce assertedly located his daily calendar. This asserted problem with the position statement and asserted explanation apparently were not brought up by Respondent before or at the hearing herein. It is noted that when the statement was received in evidence counsel for Respondent stated that ''there are matters outside of this position statement that need to be explained before the document gets in.'' No attempt was made to elicit an explanation from David Bierce at the hearing after the document was received.

[27] In *Dayton Auto Electric*, supra, the General Counsel, at the outset of the hearing stated that the conduct which eventually became the subject of the amendment was not an issue. Herein, the General Counsel did not take this position at the outset of the hearing herein. In *New York Post Corp*., supra, the allegations which were the subject of the amendment were not specifically known to the Respondent and the Respondent not only objected to the amendment but it had not previously litigated the factual basis for such a violation. In *Nickles Bakery*, supra, the charge alleged that Respondent discriminatorily disciplined the Charging Party because he was a union steward, in violation of Sec. 8(a)(3) of the Act and the complaint alleged that Respondent violated Sec. 8(a)(1) of the Act by maintaining a no-solicitation rule. There the General Counsel relied almost entirely on the contention that the ''other acts'' language in the charge form sufficiently supported the complaint allegation. The General Counsel did not take that approach here.

and that if an employer withdraws recognition because of the results of an unlawful poll, it violates Section 8(a)(1) and (5) of the Act for the poll itself is an unfair labor practice.

Respondent argues, on brief, the it had a legitimate, identifiable justification for polling its work force since eight of the employees hired as either drivers or yardmen since 1989 did not authorize dues deductions or make periodic payments to the Union and none of them were in any union affiliated benefit trust fund;[28] that the ''most probative evidence of loss of support for the union was the decline in dues checkoffs,'' *Thomas Industries v. NLRB*, 687 F.2d 863, 868 (6th Cir. 1982); that Respondent does not have to show that an actual numerical majority opposes the Union but rather it must show that it had objective reasons for doubting the Union's majority status, *Kelly's Private Car Service*, 289 NLRB 30 (1988); that the Union was inactive in that (a) no grievances or arbitrations were ever presented despite the rather open and serious violations of the involved contract and the prior contract, (b) none of the unit members were provided minimum input into the ''contract'' prior to negotiations or were asked to ratify it consistent with the Union's own constitution, and (c) some of the employees who had worked for Respondent for years had never met the Union's business agent until the very day of the hearing; that inactivity between the employer and the Union and between the Union and its members are valid considerations, *Flex Plastics*, 262 NLRB 651 (1982), enfd. 726 F.2d 272 (6th Cir. 1984); that it had been over 17 months since these parties left the bargaining table without any sort of an agreement and a 6-week hiatus is sufficient evidence; that another justification for Respondent taking the poll was employer Boulton's comment in the presence of David Bierce, namely, ''[i]f you want to ruin a good thing go ahead and try and get a union in here''; that the union steward departed without replacement; that the poll was procedurally correct since it strictly complied with the Board's requirements set forth in *Struksnes Construction Co*., supra; that the speech David Bierce read immediately prior to the voting was ''borrowed wholesale'' from one which has already gained approval from the circuit court that would review any decision reached in this case, *Thomas Industries v. NLRB*, supra; and that the *Texas Petrochemicals Corp*., supra, new requirement of some type of notice to the union before the poll cannot be imposed upon Respondent in this case since it was not even advanced by the Board until almost a year after Respondent conducted its poll in complete compliance with the existing Board precedent.

As pointed out by the Board in *Texas Petrochemicals Corp*., supra at 1061:

> In order to preserve industrial and bargaining stability, an incumbent union enjoys an irrebutable presumption of majority support for 1 year following certification. This presumption remains in effect during the term of a collective-bargaining agreement, and thereafter becomes rebuttable, on a showing of actual loss of majority support for the union, or a showing of reasonable doubt on the part of the employer, based on sufficient objective considerations, that the union continues to enjoy majority support. When an employer has sufficient objective considerations on which to base a reasonable doubt about a union's continued majority status, but might not wish to test the accuracy of that doubt directly by withdrawing recognition from the union, the Board holds that the employer may petition for a Board-conducted RM election under Section 9(c)(1)(B), or poll its employees about their union sentiments. [Footnotes omitted.]

The Board went on to indicate that its ''reasonable doubt'' standard was not accepted by three United States Circuit Courts of Appeal, which courts use the less stringent ''loss of support'' standard. It is pointed out by the Board that ''there is no compelling need for an employer with doubts concerning the majority status of its employees' selected representative to test the actual extent of support for the representative''; that the courts have recognized the potentially destructive and unsettling effects of such polls; and that it believes that the employer's interest in testing regarding an incumbent union does not outweigh the statutory goals of stability in collective-bargaining relationships.[29]

Did Respondent have a good-faith doubt of majority? Seven employees participated in the poll. One, Morgan, was a union member. Two others, Papoi and Walker, were apparently hired before the expiration of the last collective-bargaining agreement (G.C. Exh. 3), between the Respondent and the Union on April 30, 1987. As noted above, article II, section 1 of the agreement reads, as here pertinent, ''THE EMPLOYER SHALL NOTIFY THE UNION IN WRITING OR BY TELEPHONE AS TO THE EMPLOYEE'S DATE OF ORIGINAL EMPLOYMENT AND ALSO THE DATES OF LAYOFF AND RECALL OF EMPLOYEES.'' Respondent conceded that it did not notify the Union. Consequently, it appears that at least up until April 30, 1987, Respondent had a contractual obligation to notify the Union when it hired an employee in the involved unit. Did that contractual obligation continue after April 30, 1987? Since the notice requirement does not involve a term and condition of employment, it would not unless it were part of an agreement effective after April 30, 1987. As noted above, in my opinion the

[28] Not all eight were employed at Respondent when the involved poll was taken.

[29] Regarding the Sixth Circuit's decision in *Thomas Industries, Inc*., supra, the Board at 1063 in *Texas Petrochemicals Corp*., supra, pointed out that it was aware that the court criticized the Board's standard on the grounds that ''an employer would only be allowed to take a poll under circumstances where no poll was necessary; the only value of the poll would be to double check the employer's already sufficient evidence to refuse to bargain.'' The Board went on to indicate, as here pertinent, that it respectfully differed with this view, emphasizing that the ''reasonable doubt'' standard neither prohibits nor renders meaningless an employer's polling of employee sentiments regarding a recognized representative. Chairman Stephens, in his concurring opinion, pointed out that the Sixth Circuit was mistaken about the substance of the Board's standard for reasonable good-faith doubt of majority in that the court appeared to believe that the ''good faith doubt'' test was no different from the ''actual loss of majority test,'' because at page 867 of its decision the court stated that the Board took the position ''that an employer must set forth objective evidence *establishing* that *over 50 percent of affected employees have rejected the incumbent union* as their representative before the employer may take a poll.'' (Emphasis added by Chairman Stephens.)

Respondent and the Union did not enter into an agreement effective after April 30, 1987.

While the failure to notify the Union about the aforementioned hires is not in itself an unfair labor practice, in my opinion it demonstrates that, at least to that extent, Respondent did not maintain a hands off approach. In other words, to a degree it set up the situation and then attempted to capitalize on it.[30]

As indicated above, Respondent cites *Thomas Industries*, supra at 868 for, among other things, the proposition that the ''most probative evidence of loss of support for the Union was the decline in dues check-offs.'' There, the court went on to note at page 868 ''[t]he mere fact that a low percentage of employees utilize automatic check-offs does not necessarily indicate a loss of support for the Union since checkoffs are voluntary.'' Also, the court noted ''[b]ecause it is subject to varying interpretations, even a rapid or large decline in checkoffs may not be enough in itself to justify the taking of a poll.'' In that case, the court pointed out, the Company had additional objective evidence of employee dissatisfaction with the Union in that at least one-third of the employees in the bargaining unit had made negative comments about the Union, there were employee resignations from the Union and six union officials, including one vice president, resigned.

Putting aside for the moment Respondent's assertions on brief as to why the poll was conducted, lets examine David Bierce's testimony as to why he conducted the poll. He testified that he wanted to determine what the sentiments of his employees were regarding the Union. What caused him to want to make this determination? Bierce testified about the above-described verbal exchange between Boulton and Thompson which he, Bierce, witnessed. As noted above, Boulton told Thompson ''if you want to screw up a good thing over something as stupid as uniforms, get the Union in here.'' Neither Boulton nor Thompson were union members. Bierce testified that no one else complained to him about the Union; that there was very little discussion about the Union; that no one else indicated that they were dissatisfied with the Union; and that it was time to discern what the people wanted because there was one employee in the Union and Bierce had a bunch of new hires. This does not amount to the ''additional objective evidence of employee dissatisfaction with the Union'' which the Sixth Circuit spoke to in *Thomas Industries*, supra. Boulton's above-described comment was the only negative comment about the Union.

Regarding Respondent's assertions on brief, Respondent did not demonstrate that the Union actually had any reason for presenting grievances or for going to arbitration.[31] Respondent did not demonstrate that the Union even knew of the Noel discharge. Respondent certainly did not notify the Union about the Noel hire. The one union member to testify herein, Morgan, with respect to input into the contract negotiated in 1987 testified that he discussed the contract with his union steward. Apparently, the employees were not asked to ratify the ''new'' contract. But there is no indication on this record that Respondent was even aware of that fact when it took the poll. Also, there is no indication in this record that Respondent was aware before the involved poll of the fact that a number of Respondent's employees had not met DeStefano before the trial herein. There is no evidence in this record that any unit employee had sought the Union's assistance without receiving its full support during the period of alleged inactivity. Nothing submitted by Respondent herein supports a conclusion that the Union had abandoned its representative status.

None of the asserted basis indicating the Union's asserted inactivity suffice to raise a reasonable good-faith doubt. Indeed, in my opinion, when the record is considered as a whole, they would not even meet the less stringent ''loss of support'' standard. In my opinion, Respondent has failed to establish that it had a good-faith doubt of the Union's majority status reasonably premised upon objective considerations.

Regarding whether the polling itself was ''non-coercive and procedurally fair,'' *Thomas Industries*, supra at 868, it is noted that Respondent, on brief, points out that the speech David Bierce gave was taken wholesale from *Thomas Industries, Inc*., supra. That is an accurate representation. In that case the Board took the position that the ''captive audience'' speech while not an unfair practice in itself, did prejudice the poll. The court disagreed finding that the speech primarily communicated the purpose of the poll to the employees as required by *Struksnes Construction Co*., supra. The court further noted that in that case the union president also spoke to the employees before the voting. In view of the aforementioned Board position regarding the ''captive audience'' speech in *Thomas Industries*, supra, I must make a similar finding. This finding is bolstered by the fact that Tom Bierce did not deny that when the ''captive audience'' speech was given he also spoke, extemporaneously, stating that he wanted to be able to run the Company without people watching what he was doing all of the time. And with respect to the fairness mentioned by the Sixth Circuit, it is noted that no one representing the Union also spoke to the employees before the voting. Indeed, the Union did not even know about the poll until it was a fait accompli. It is also noted that the other two Circuits, the Fifth (since 1981) and the Ninth (since 1984),[32] which Circuits also apply the less stringent

[30] It is noted that the notification provision in the contract affected less than a majority of those voting in the involved poll.

[31] David Bierce is not credited regarding the assertion that DeStefano said he knew that Bierce had people working for it who were not in the Union. DeStefano's denial is credited. DeStefano did not specifically deny David Bierce's testimony that although he, DeStefano, had not seen Bierce's payroll records he knew Bierce was not paying scale and as long as he, DeStefano, did not have somebody from Bierce at his office breathing down his neck, Bierce could pretty well *do what it could get away with*. (Emphasis added.) Assertedly this statement was made at the April 24, 1987 negotiating session. It is noted that there is no mention of it in Respondent's aforementioned January 19, 1989 position statement to the Board. As pointed out in *Flex Plastics, Inc*., supra, even assuming that this type of statement is made by a business agent, it would not justify Respondent's conduct for such a statement does not reflect employee dissatisfaction from the Union. Rather it reflects at most what appears to be one business agent's alleged individual personal feelings. Apparently no employee ever filed a grievance regarding the pay scale. And there was no proof, other than this assertion, that DeStefano actually knew what Respondent's pay scale was, or that it was other than what was called for in the involved collective-bargaining agreement.

[32] *NLRB v. A. W. Thompson, Inc*., 651 F.2d 1141 (5th Cir. 1981). and *Forbidden City Restaurant v. NLRB*, 736 F.2d 1295 (9th Cir. 1984).

''loss of support'' standard, require notification to the union before the employees are polled. And the Board, in *Texas Petrochemicals Corp*., supra, required the employer to give the Union reasonable advance notice of the time and the place of the poll. But Respondent argues, on brief, that since its poll was taken before the Board decided *Texas Petrochemicals Corp*., supra, it was not required to give the Union advance notice of the poll. In *Texas Petrochemicals Corp*., supra, the Board agreed with an administrative law judge that the Respondent involved in that case independently violated Section 8(a)(5) and (1) of the Act by failing to provide the Union with advance notice of the time and place of the poll. In other words, while the Board had not imposed an advance notice to the union requirement on employer conducted polls taken to determine whether an incumbent union continues to have the support of a majority of the employees it represents, the Board found therein that the involved respondent had violated the Act by failing to give advance notice to the Union. The Board therein went on to point out that the *Struksnes* guidelines were initially developed and are most often applied, in situations where a nonincumbent union is engaged in an initial organizing campaign, seeking to represent the employees in question; that at the time of the poll, the union will ordinarily have been in close continuing, active contact with the employees; that even if the results of such a poll are unfavorable to the union, it is not thereafter deprived of its entitlement to a Board conducted election on a sufficient showing of interest; that, at least arguably, advance notice to the union of such a poll is less critical substantially and procedurally, than it is to an incumbent union, where such a union could be legitimately stripped of recognition as a collective-bargaining representative based on the results of such a poll; and that the imposition of a procedurally stringent requirement that an employer provide a union with reasonable advance notice of such polls is consistent with the imposition of the substantially more stringent ''reasonable doubt'' standard for conducting such polls in the first place. As noted above, even with the less stringent ''loss of support'' standard the Fifth and the Ninth Circuits require advance notice to the union and the Sixth Circuit made a point in *Thomas Industries*, supra, of noting that to be reliable the polling must be procedurally fair and there the union representative also spoke to the employees before the voting.

Respondent's poll of employees about their continued support for the Union violated Section 8(a)(5) and (1) of the Act in that Respondent did not have a reasonable doubt, based on objective considerations that the Union continued to have the support of a majority of the employees, but also because the Respondent failed to provide the Union with reasonable advance notice of the time and place of the poll.

As noted above, Respondent did not have sufficient objective considerations on which it could base a reasonable doubt about the Union's continued majority status for purposes of justifying the Respondent's poll. Similarly its subsequent withdrawal of recognition was not justified. And obviously the Respondent cannot rely on the results of the poll as an objective consideration, because the poll itself was an unfair labor practice. Respondent's withdrawal of recognition violated Section 8(a)(5) and (1) of the Act.

Paragraph 7 of the amended consolidated complaint alleges that in or about March 1989, Respondent through its supervisors and agents David Bierce and Lou Bierce, at its facility, informed an employee that it was ridding itself of the Union and dealt directly with said employee over benefits, including his retirement and other terms and conditions of employment. The General Counsel contends, on brief, that it follows that if the Respondent's withdrawal of recognition from the Union was unlawful, than its direct dealing with Morgan in March 1989 was also a violation of the Act. As noted above, Respondent, on brief, argues that where an employer legally refuses to execute a purported agreement, and lawfully polls its work force and withdraws recognition, an allegation of direct dealing cannot lie. While Respondent is correct about the purported agreement, it is wrong with respect to its assertions regarding the polling and the withdrawal of recognition. Morgan's above-described testimony was not refuted. It is credited. As found above, Respondent unlawfully withdrew recognition from the Union as the bargaining representative of the above-described employees.[33]

[33] Some of Respondent's other contentions should be treated. Respondent argues that allegations of improper withdrawal of recognition cannot be sustained where the parties never intended to enter into a real collective bargaining relationship, *Ace-Doran Hauling & Rigging Co*., 171 NLRB 645 (1968), *Bender Ship Repair Co*., 188 NLRB 615 (1971), and *McDonald's Drive-In*, 204 NLRB 299 (1973); that the refusal to execute charge is time-barred because the Union had knowledge, constructive or otherwise, that Respondent was not going to execute a contract when it utterly failed to apply nearly all of the economic and noneconomic obligations, *Chambersburg County Market*, 293 NLRB 654 (1989); and that ''since the Union has recognized its members only unit it has been widdled to but one . . . Morgan, there is no longer an appropriate unit for bargaining.'' *Chemtron Corp*., 268 NLRB 335 (1935). In *Ace-Doran Hauling & Rigging*, supra, the Board concluded that the complaint allegations must fall because the agreements in evidence failed to define a unit with a sufficient degree of clarity to warrant a finding that the contracts are ones to which a presumption of majority status can attach, and because the practice under the 'contracts' makes it evident that the parties had no intention of entering into a real collective-bargaining relationship. There, one-half of the contracts involved were not signed by an admitted representative of the respondent but rather they were signed by a representative of an association which respondent asserted did not have authority to sign for it. The Board indicated that it could not conclude that the contracts raised a presumption of regularity or that the 'union' was the majority representative of respondent's employees. The Board went on to point out that the evidence relating to the practice under the agreements further makes it clear that the parties did not intend them to be effective collective-bargaining contracts; and that the acquiescence of the unions in respondent's failure both to enforce the union-security provisions of the agreements and to pay health and welfare contributions for all employees makes it clear that the parties did not believe that they were in a true collective-bargaining relationship. Here there is no question about the clarity of the unit description.'' Regarding the practices under the contract, it is noted that at one time all of Respondent's involved employees were in the unit and apparently Respondent enforced the applicable provisions of the contract. It has not been demonstrated herein that the Union acquiesced in Respondent's subsequent failure to enforce the union-security provision, the wage provision and to pay health and welfare contributions for all employees. *Bender Ship Repair Co*., supra, and *McDonald's Drive-In*, supra, also involved unit problems and it was concluded in both cases that the unit defined therein was ambiguous in scope. In the latter it was concluded the parties never entered into a true collective-bargaining relationship out of which a presumption of the union's majority status may arise. Here we are dealing with a case where there is no question but that before the situation at hand arose

Continued

Consequently, Respondent was still under an obligation to bargain with the Union when it, through its agents, approached Morgan and unlawfully dealt directly with him and thereby violated Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act, and has at all times since about 1974 been the representative for purposes of collective bargaining of a majority of the employees in the appropriate unit consisting of all mixer drivers (agitator and nonagitator), building supply drivers (single axle and multiple axle), warehousemen, yardmen, batchmen (manual control) and owner operators, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

3. By conducting a poll among its employees in November 1988 concerning whether they desired to be represented by the Union, and by failing to give advance notice to the Union of the time and place the poll was conducted, Respondent refused to bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

4. By withdrawing recognition from the Union in November 1988, Respondent refused to bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

5. By dealing directly with an employee in derogation of the employee's bargaining representative with respect to the employee's benefits, including his retirement, and other terms and conditions of employment in violation of Section 8(a)(1) and (5) of the Act.

The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has committed unfair labor practices, I shall order it to cease and to take affirmative action designed to effectuate the policies of the Act. I shall recommend that the Respondent be ordered to recognize and, on request, bargain with the Union as the bargaining representative of the employees in the appropriate unit and put in writing and sign any agreement reached on terms and conditions of employment and to post appropriate notices.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[34]

ORDER

The Respondent, The Henry Bierce Co., Akron, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with the Union as the exclusive bargaining representative of all of the employees in the unit described below by failing to provide the Union with reasonable advance notice of the time and place of the poll of unit employees taken for the purpose of determining their desire for continued representation by the Union; by conducting an unlawful poll for such purpose; by unlawfully withdrawing recognition from the Union; and by dealing directly with an employee over benefits, including his retirement, and other terms and conditions of employment.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain collectively with Chauffeurs, Teamsters, Warehousemen and Helpers, Local Union No. 348 a/w International Brotherhood of Teamsters, Warehousemen and Helpers of America, as the exclusive bargaining representative of the employees in the following appropriate bargaining unit and, if an understanding is reached, embody such understanding in a signed agreement:

> [A]ll mixer drivers (agitator and nonagitator), building supply drivers (single axle and multiple axle), warehousemen, yardmen, batchman (manual control) and owner operators, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) Post at its Akron, Ohio facility, copies of the attached notice marked ''Appendix C.''[35] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX A

I have called this meeting today in order to get your decision as to whether or not you want the Company to continue to deal with the Teamsters, Chauffeurs and Helpers of America Union, Local No. 348, on matters pertaining to the terms

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the parties had a true collective-bargaining relationship based on majority status. Regarding *Chambersburg County Market*, supra, the instant case does not involve a situation where it is asserted that the charge is timely because it was brought within 6 months of *any* refusal to execute a contract. The refusal to execute allegation herein will be dismissed. Nonetheless, it is noted that here the first refusal occurred within 6 months of the involved charge, and it has not been demonstrated, in my opinion, that the union was notified of a refusal prior to October or November 1988. And finally, *Chemtron Corp*., supra, involved a situation where the unit was reduced to a single person prior to the Respondent's withdrawal of recognition. There, no one else shared a community of interest with the one person left in the unit. Here, when Respondent withdrew recognition there were a total of seven drivers or yardmen.

[34] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[35] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

and conditions of your employment. As some of you may or may not be aware, the last collective bargaining agreement we executed with the Union expired on April 30, 1987, when we received their notification in the mail that they desired to terminate that contract, and engage in negotiations toward a new agreement. Very little in terms of any negotiations towards a successor bargaining agreement have happened thus far, and indeed, it was only recently that the Union began requesting that negotiations and the execution of a new bargaining agreement take place. Many of you have expressed and asked why the Company still gives recognition to the Union since so few of you have indicated any interest in the Union, and almost all of you are not on the union dues check-off. The only reason the Company has recognized, and continues to recognize the Union is because the law has required us to do so thus far. Now, with the last bargaining agreement expiring over one and one-half years ago, and the Union now pressing for us to sign and execute a new bargaining agreement, you as an individual have the right to decide for yourself now whether or not you want the Company to continue to recognize the Union. That is our purpose in being here today—to determine whether the Union continues to represent a majority of our employees. If the Union fails to poll the majority of the votes cast, the Company will no longer recognize the Teamsters as your bargaining representative, nor engage in negotiations towards a successor bargaining agreement. Of course, should the Union receive a majority of the votes cast the Company must by law continue to recognize the Union as your bargaining agent, and bargain in good faith towards a new agreement.

In order to make sure that everyone's rights are protected we are going to let each of you vote in a secret ballot. I have asked _____ to come here today to handle the election and to count the ballots in your presence. There will be no supervisors or representatives of management present when you vote on this important matter. We ask that you, one by one, go into the next room, fill out one of the ballots, and drop it in the ballot box. Please do not put your name or any other markings on the ballot other than your vote.

Before the voting begins, by law I am required to inform you of a few matters. First, the purpose of this poll is solely to determine the truth of the Union's claim to continued majority representation of you. The actions and comments from some of you have led us to believe that you do not desire to be represented by this Union. Thus, this poll is being undertaken solely to ascertain whether the Union demanding recognition, the Teamsters, actually represents a majority of you. Second, you must understand that absolutely no action will be taken against any of you as a result of how you vote, or how this election turns out. This is your election and you have the legal right to vote however you please. This Company will not take any reprisals or retaliations due to the manner in which any of you vote, or in which this poll ultimately turns out. Next, this will be a secret ballot election. No one, not even your co-workers or supervisors, will ever know how you voted unless you voluntarily tell them.

I thank you for your time, and attention. I apologize for having to read this little introduction, but it was necessary in view of the fact that the law on this area is a little bit complicated and confusing. Remember, please vote one at a time in the separate room, and mark the ballots only as ''Yes'' or ''No.''

APPENDIX B

January 19, 1989

Ms. Christine S. Hoffer
Field Attorney
The National Labor Relations Board
Region 8
1240 East Ninth Street
Room 1695
Cleveland, OH 44119-2086

Re: *The Henry Bierce Company*
[Case No. 8–CA–21471]

Dear Ms. Hoffer:

The following shall serve as the position statement of The Henry Bierce Company (''the Company'' or ''Respondent'') in the above-referenced matter. When one reaches right to the heart of the dispute in this case, it seems inconceivable that Local 348 of the International Brotherhood of Teamsters, Chauffeurs Warehousemen and Helpers of America (''the Union'') could seriously contend that a collective bargaining agreement was reached with the Company where absolutely no terms or conditions of that ''contract'' have been adhered to by either party for almost twenty full months prior to the filing of the instant unfair labor practice charge. Setting aside the readily apparent issue relating to the untimeliness of the charge, no reasonable administrative body could possibly conclude a ''meeting of the minds'' was ever struck between the parties, at least with respect to all material terms and conditions of employment. Rather, the Union's unfair labor practice charge seems to be more of a futile attempt to force representation of a bargaining unit which has clearly, and unmistakenly rejected it as their statutory, bargaining representative. For the reasons expressed below, Respondent respectfully requests that the charge be dismissed in its entirety, with prejudice.

STATEMENT OF FACTS.

Respondent runs a general hardware operation which also serves as a building material sales and distribution point. For a number of years, its yardmen and building material drivers have been represented for purposes of collective bargaining by the Union. Also, for a number of years, Respondent was a member of a multi-employer bargaining group consisting of all local concrete haulers, but broke away from the multi-employer unit prior to negotiations for its May 1, 1984 bargaining agreement.

Collective negotiations aimed at the May 1, 1984–April 30, 1987 contract were handled by Mr. Robert DeStefano for the Union, and Mr. David W. Bierce, for Respondent, although it was clearly expressed that any tentative agreement reached by the parties was subject to final approval by the president and owner of the Company, Mr. Lou Bierce. The parties were eventually able to completely agree on all material terms and conditions of employment relating to the 1984–87 bargaining agreement, which was then reduced to writing and signed and executed by Mr. DeStefano and Mr. David Bierce.

In anticipation of negotiations aimed at a new collective bargaining agreement, and in accordance with the notice of termination provisions contained in the 1984–87 contract, the Company on February 16, 1987, served notice that it desired to terminate the existing contract upon its expiration, and negotiate towards a successor bargaining agreement. Similarly, the Union on February 23, 1987, served its official notice to terminate the labor agreement as of April 30, 1987, and engage in collective negotiations towards a new bargaining agreement.

The first bargaining session between the parties occurred on or about April 15, 1987, wherein Mr. David Bierce met for a brief period of time with Robert DeStefano at the Union offices. Therein, the Union presented its initial written proposal which called for a $1.00 increase in hourly wages of all unit employees each of the anniversary years of the new bargaining agreement, and proposed a provision for jury duty pay. The Company, for its part, presented the Union with the Materialmen's Association collective bargaining agreement for Cuyahoga County which had recently been negotiated and signed. The Materialmen's bargaining agreement contained a number of concessions, and Respondent indicated that it was opposed to annual, hourly wage increases where other unions in the area were negotiating give-backs. While Mr. DeStefano asserted that the negotiations concerned two separate work areas, the parties departed with a firm disagreement regarding the wages to be incorporated in the new agreement. Mr. David Bierce, however, agreed to take the Union's initial written proposal back to Mr. Lou Bierce for consideration and input. Not surprisingly, Mr. Lou Bierce was firmly opposed to granting of annual wage increases given the Cuyahoga County Materialmen's contract.

No further negotiations or discussions occurred between the parties until on or about April 24, 1987, when again Mr. David Bierce met at the Union hall with Mr. DeStefano. This time, the Union presented an oral proposal again calling for annual hourly wage increases of .63, .60 and .60 throughout the term of the proposed successor bargaining agreement. The Union also for the proposed that increases to health and welfare premiums be capped at 10% per year, and that pension/retirement increases be granted from $65.00 per week per employee to $69.00 per week per employee. Finally, the union indicated that several benefit increases occurred with respect to its health and welfare program, although they clearly desired the Company to maintain that plan. Again, the Company's response was that annual wage increases would be entirely unacceptable given the existing Materialmen's contract. How was it the Union could be insisting on annual hourly wage increases when the Cuyahoga County Materialmen successfully bargained for substantial decreases? Nevertheless, Mr. David Bierce informed Mr. DeStefano that he would take the Union's proposal back to Mr. Lou Bierce for consideration and discussion, and get back to him at a later date.

On or about April 27, 1987, after speaking with Mr. Lou Bierce regarding alternatives to annual wage increases, Mr. David Bierce again met with Mr. DeStefano at the Union hall and presented an alternative solution to the wage issue. Mr. David Bierce proposed that instead of an annual hourly wage increase, the bargaining unit employees receive lump-sum annual increases of $400.00, $400.00, $400.00 payable each May 1 throughout the term of the agreement. Mr. David Bierce also proposed that if the Union were to insist on annual, hourly wage increases, the Company would not accede to any increases in excess of .30, .25, and .25 throughout the term of any successor agreement. Mr. DeStefano then indicated that he would consider the lump-sum proposal, as well as the Company's alternative hourly wage increase proposal, and get back to the Company with an answer. Unfortunately, the Union or its representatives never returned any phone calls or indeed attempted to minimally meet in person with Company representatives from April 27, 1987 until on or about July 1, 1988 wherein Mr. David Bierce received a telephone message from Mr. DeStefano indicating he desired to meet with him.[1] Mr. Bierce informed Mr. DeStefano that due to other previous commitments, a meeting was not possible on that date with respect to possible, continued negotiations. Again, no correspondence was received from the Union until on or about August 25, 1988 when again Mr. David Bierce received a phone call from Mr. DeStefano. Mr. Bierce was out at that time, and upon returning the phone call to Mr. DeStefano, was informed that Mr. DeStefano was out.

Finally, at sometime after August 25, 1988, Mr. DeStefano appeared in person at The Henry Bierce Company with a proposed, written collective bargaining agreement, and asked that Company representatives execute it. Mr. David Bierce refused to sign the contract indicating that it had been over a year and one-half since the parties last spoke, and he needed to find out just exactly what the Union had included in the proposed written agreement. Moreover, Mr. Bierce was concerned about the effective date of application of the collective bargaining agreement, since the parties were already well into the second year of a three year ''contract,'' and had not been applying that ''contract'' to a single bargaining unit person. Finally, based upon a very clear and unequivocal indication from bargaining unit personnel, Mr. Bierce had serious doubts as to the Union's continued status as bargaining representative for the majority of the employees of the Company.

In November 1988, with expressions of employee dissatisfaction and union rejection on the increase, Respondent called together its bargaining unit personnel, informed them that the Union had requested to re-commence negotiations towards a new bargaining agreement, and that given their expressions of dissatisfaction, it did not believe they continued to represent a majority of the workforce. As such, Respondent arranged to conduct a poll of its employees via secret ballot to determine whether, in fact, the Union continued to

[1] Respondent cannot factually state precisely why the Union virtually abandoned negotiations at this point but can certainly speculate given its knowledge of events concerning a local concrete, ready-mix operation, The Botzum Bros. Botzum, which not incoincidently is also represented by Local 348 was engaged in a bitter strike with the Union beginning in April, 1987, and that dispute carried over throughout much of 1988 when the Company was eventually sold to a purchaser, South Central Ready Mix. South Central hired replacements who sought representation of a different union, the operating engineers. The Union maintained picket lines virtually throughout the entire time period of 1987 and leading into 1988, including having to make a number of county court appearances relating to injunctions and violations of restraining orders with respect to mass, violent picketing. No doubt, Mr. DeStefano's interests were turned to Botzum throughout this time since it was a much bigger fish to fry than Respondent who had, at most, seven bargaining unit members.

represent a majority of employees. All bargaining unit employees voted in the poll, and the results were six against the Union, and one person voting for continued representation. Following the results of the poll, Respondent refused to meet and continue to negotiate with the Union due to the clear and unequivocal exhibited lack of majority support amongst the workforce.

LEGAL ARGUMENT.

A. *There Was No ''Meeting of the Minds'' With Respect To All Material Issues Of The Proposed Successor Bargaining Agreement.*

It is now well-settled that ''when an oral agreement is reached as to the terms of a collective-bargaining contract, each party is obligated, at the request of the other, to execute that contract when reduced to writing, and failure or refusal to do so constitutes an unfair labor practice.'' *Oil Chemical & Atomic Workers International Union (Capital Packaging Co.)*, 212 NLRB 98, 108 (1974). it is also axiomatic, however, that in determining whether a collective bargaining agreement exists, the Board must find a ''meeting of the minds'' as to all material, substantive terms and conditions of employment. *Lithochrome Corp*., 276 NLRB 136, n.1 (1985). Any material terms or conditions missing as a result of the parties' failure to agree simply cannot be supplied by the Board or an administrative law judge. *Interprint Co*., 273 NLRB 1863 (1985). Without question, a ''meeting of the minds'' with respect to wages is a material condition of employment without which no collective bargaining agreement can be found to exist. *See Liberty Pavillion Nursing Home*, 259 NLRB 1249 (1982) (although parties agree to all substantive terms of contract, wages was made subject to Board approval and thus condition precedent to formation of contract). Likewise, the commencement, or effective date of a proposed agreement is an essential, substantive term. *Mercedes-Benz of North America*, 258 NLRB 803 (1981).

Not surprisingly, any analysis into whether the parties arrived at a ''meeting of the minds'' with respect to material issues in a contract frequently turns on the credibility regarding negotiations. However, the Board had not hesitated to turn to the actions of the parties in determining whether, in fact, an agreement had ever been reached. See *Torrenton Construction Co., Inc*., 235 NLRB 1540 (1978). For if parties are abiding by the terms and conditions contained in the asserted contract, and more importantly, those terms and conditions of employment are changed from the previously existing collective contract, then an employer or union will be hard pressed to legitimately assert there was never an agreement reached. *Id*. The corollary of this position is also necessarily true, for when the parties act as if no contract existed, for particularly a long period of time, then the logical conclusion is that, indeed, no agreement was ever reached.

Here, both the Union and Company, despite good faith negotiations and bargaining, had a legitimate dispute with respect to the wages of employees—a material condition precedent to contract formation. The Union, for its part, was insisting on an hourly wage increase throughout all anniversary years of the proposed successor bargaining agreement. The Company, opposed such an increase, particularly given recent bargaining which had taken place in the Cuyahoga County area with respect to materialmen. As such, it proposed a lump-sum payment each anniversary date of the successor contract, and no hourly wage increase to employees. In the alternative, the Company proposed that any hourly wage increase sought or insisted by the Union be at a substantially lower lever than those last proposed. Although the Union indicated it would consider the Company's last proposals, no subsequent bargaining or discussions took place for some fourteen months.

There are two critical undisputed facts in this case which undeniably lead to the conclusion that the Union and Company *never* reach an agreement with respect to a successor bargaining agreement. First, not once from the April 30, 1987 contract expiration date up until the present date have employees within the scope of the bargaining unit been provided any of the benefits of the written agreement recently presented by the Union in August, 1988. Thus, the employees received no wage increases, whether hourly or as a lump-sum benefit. Moreover, there were absolutely no grievances filed, no attempted use of the grievance/arbitration procedure, none of the premium increases in fringe benefits provided, or any other factors indicating that a ''contract'' was in fact in force. Secondly, the terms and conditions of employment the employees were employed under by the previous collective bargaining agreement continued in place, without change. Certainly, by the actions of the parties, there was no meeting of the minds with respect to a new agreement.

This, of course, leaves open the question as to whether the Union was free to accept one of the two alternative proposals regarding wages made by Respondent back in April, 1987. There is no question but that given the written contract presented for execution by the Union last August, they have chosen to accept the wage increases along a ''$400, $400, $400'' lump-sum manner. Nor is there any question but that the Company never formally withdrew the two proposals it issued back in April, 1987. In *Lucas County Farm Bureau*, 218 NLRB 1150 (1975), the Board examined whether a contract had been formed, where during negotiations for a successor bargaining agreement, the employer made a proposal which was originally rejected by the Union membership, but three months later accepted by the Union. Originally, the Board overruled the decision of the administrative law judge, and held that the Company's proposal was outstanding since it was never unequivocally withdrawn. Thus, notwithstanding the union's initial rejection, the proposal continued to lay on the table and was therefore subject to acceptance. Nine months after issuing its decision, the Board reconsidered it, this time affirming the decision of the administrative law judge. Here, the Board took the position that there was insufficient evidence to warrant a finding that the company's May 1974 offer for a new contract remained open and could be accepted by the union as late as August, 1974. Accordingly, the Board found that the company did not violate § 8(a)(5) of the Act by refusing to reduce to writing an ''agreed upon'' collective bargaining contract. In effect, the Board has held that notwithstanding an explicit withdrawal of a proposal, where circumstances arise which would lead a party to reasonably believe that an offer had been withdrawn, a proposal in negotiations cannot be subsequently, and belatedly accepted. Respondent submits that a passage of some fourteen months from the time it first proposed the two alternative methods for resolving the dispute regarding wages is clearly enough time to put a party on reasonable notice that

an offer has been, in effect, withdrawn. The Union simply cannot go about its business and ignore the Company for such a long period of time and then unabashedly seek to choose one of the two alternatives presented to it fourteen months earlier.

Because the parties never had a mutual understanding with respect to wages of asserted bargaining unit employees, because the parties never, at any time, acted as if there had been an agreement enforceable between them, and further because the Company's April 1987 proposal was not subject to acceptance in July, 1988, given the passage of time, Respondent respectfully requests that the instant charge be dismissed in its entirely, with prejudice.

B. *The Charge Is Barred By The Applicable Statue Of Limitations.*

The NLRA requires that a party wishing to contend that a violation of the Act exists, pursue their right in a timely fashion. To achieve its purpose of providing minimum protections in the labor relations field, and at the same time prevent employers from having to defend themselves from stale, outdated claims, Congress provided a relatively short six-month limitations period with respect to unfair labor practice charges. *See* 29 U.S.C. § 160(b). Where a § 8(a)(5) charge alleges that a party is continuing to refuse to execute an ''agreed upon'' bargaining contract, the Board has held that the 10(b) statute of limitations begins to run where there has been an unequivocal intention by one of the parties to repudiate the asserted contract.

In *Island Typographers, Inc*., 252 NLRB 9 (1980), the Board examined whether a § 8(a)(5) refusal to execute a contract violation was present where the asserted ''agreement'' was reached in October, 1976, but no unfair labor practice charges were filed until December, 1978. Between the time that an asserted contract was reached and the filing of the charges, the employer was in substantial violation of the asserted collective-bargaining agreement's provisions, and failed to apply its provisions to a certain segment of its employees who would have clearly been covered under it. In rejecting the General Counsel's argument that the Union had no prior notice of the employer's violations or, in the alternative, the employer's actions constituted a continuing violation, the administrative law judge noted:

> The record is clear that by the summer of 1977, the union knew that new equipment had been introduced, that new employees had been hired to operate the cold type equipment, and that respondent was not applying the contract to new employees and was clearly maintaining its intention not to apply the existing contract language in the future. There was nothing equivocal in the Respondent's dealing with the Union concerning cold type employees. Although Respondent was negotiating new provisions, these negotiations apparently ceased sometime in the summer of 1977. Therefore, the Union had notice for well over one year that no progress was being made and no steps taken to bring cold type employees within the contractually mandated terms and conditions of employment. I conclude, therefore, that Respondent's actions took place outside the six-month period preceding the date of the first charge herein . . . .

Id. at 14–15.

Thus, even assuming, *arguendo*, an ''agreement'' was ever reached between the Union and the Company as to a successor bargaining agreement, the Company's actions in failing to adhere to *any* of the contract's provisions for some nineteen months represented an unequivocal, total repudiation of the asserted contract occurring well outside the § 10(b) limitations period. Thus, the present charge is clearly time-barred.

C. *The Union Lacks Majority Support.*

Section 8(a)(5), of course, makes it unfair labor practice for an employer ''to refuse to bargaining collectively with the representatives of its employees, *subject to the provisions of Section 9(a).*'' 29 U.S.C. § 158(a)(5) (emphasis added). Section 9(a), in turn, requires a representative designated or selected for the purpose of collective bargaining be chosen by ''a majority of the employees.'' Hence, as an indispensable pre-requisite to establishing a Section 8(a)(5) violation, the General Counsel must prove the representative does, in fact, represent a ''majority of the employees.'' Here, Respondent has substantial, objective evidence of the loss of union majority support prior to its continued negotiations towards a successor bargaining agreement. There were frequent, almost daily comments about lack of union representation, absolutely no meetings or discussions between the Union and the Company for over fourteen months, and only one of seven asserted bargaining unit members had exercised a dues check-off provisions. Moreover, there was a substantial turnover in the number of prior employees, and the new workers at no time indicated any desire for unionization or continued union support. Without question, then, the Company had objective evidence of loss of support of representation sufficient to confirm, through polling, whether in fact the Union continued to represent a majority of its personnel.

In order to assure reliability, Respondent polled, in a non coercive and procedurally fair atmosphere, its employees pursuant to the guidelines set forth in *Struksness Construction Company*, 165 NLRB 1062 (1967). That is, the purpose of the poll was to determine whether the Union enjoyed a continued majority support sufficient to require Respondent to continue negotiations with the Union; that purpose was unequivocally communicated to the employees; all assurances against reprisal were provided; the employees were polled by secret ballot; and the polling was conducted in an uncoercive place, free of any management representatives who may induce or inhibit free voting. The results of the polling, of course, confirmed the objective evidence that the Union had lost majority support, as six of the seven potential bargaining unit members no longer desired to be represented by the Union. Since the indispensable § 8(a)(5) can be found to exist.

Moreover, the Board has held that even assuming the parties have reached an agreement on a successor bargaining agreement, such an agreement, if unsigned, will not serve to defeat employee dissatisfaction of union representation which follows formation of the contract, but prior to its execution. *See Crothall Hospital Services, Inc*., 270 NLRB 1420 (1984). Thus, despite the fact the parties may agree *in toto* on the terms and conditions of a bargaining agreement, such contract or agreement will not bar a de-certification petition filed prior to formal execution of the contract. *Id.* Although no

contract has ever been agreed to or reached in this case, even if one were to accept the Union's position, that one was, the lack of execution coupled with the now firm evidence that the Union no longer represents a majority of the employees precludes the issuance of a § 8(a)(5) complaint.

CONCLUSION.

For the foregoing reasons, Respondent respectfully requests that the Union's charges alleging violation of § 8(a)(5) be dismissed in their entirety, with prejudice. If you have any questions on the above, or desire any further information, please do not hesitate to call at your earliest convenience.

Very truly yours,

Keith Pryatel

KLP/gg

APPENDIX C

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain with the Chauffeurs, Teamsters, Warehousemen and Helpers, Local Union No. 348 a/w International Brotherhood of Teamsters, Warehousemen and Helpers of America as the exclusive bargaining representative of all of the employees in the unit described below by failing to provide the Union with reasonable advance notice of the time and place of the poll of unit employees taken for the purpose of determining their desire for continued representation by the Union; by conducting an unlawful poll for such purpose; by unlawfully withdrawing recognition from the Union; and by dealing directly with an employee over benefits, including his retirement, and other terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, on request, bargain collectively with Chauffeurs, Teamsters, Warehousemen and Helpers, Local Union No. 348 a/w International Brotherhood of Teamsters, Warehousemen and Helpers of America, as the exclusive bargaining representative of the employees in the following appropriate bargaining unit and, if an understanding is reached, embody such understanding in a signed agreement:

> [A]ll mixer drivers (agitator and nonagitator), building supply drivers (single axle and multiple axle), warehousemen, yardmen, batchman (manual control) and owner operators, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

THE HENRY BIERCE CO.